Case C-128/20

Request for a preliminary ruling

Date lodged:

19 February 2020

Referring court:

Landesgericht Klagenfurt (Austria)

Date of the decision to refer:

19 February 2020

Applicant:

GSMB Invest GmbH & Co. KG

Defendant:

Auto Krainer Gesellschaft m.b.H.

[…]

DECISION

CASE

Applicant […]

GSMB Invest GmbH & Co. KG

[…]

10245 Berlin […]
GERMANY

Defendant […]

Auto Krainer Gesellschaft m.b.H.
[…]
9020 Klagenfurt am Wörthersee
[…]

Concerning:

EUR 21 111.27 […]

A) The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. *Is Article 5(1) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information to be interpreted as meaning that the equipment of a vehicle, within the meaning of Article 1(1) of Regulation No 715/2007, is inadmissible if the exhaust gas recirculation valve (i.e. a component that is likely to affect emissions performance) is designed in such a way that the exhaust gas recirculation rate (i.e. the portion of the exhaust gas being recirculated) is regulated in such a way that the valve ensures a low-emission mode only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m, and, outside this temperature window, per 10 degrees Celsius, and above an altitude of 1 000 m, per 250 metres of altitude, the rate decreases in a linear way down to zero, meaning that* **[Or. 2]** *NOx emissions increase beyond the limits of Regulation No 715/2007?*

2. *Is Article 5(2), which states 'in terms of protecting the engine against damage', of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information to be interpreted as meaning that an exhaust gas strategy that serves principally to protect components such as the exhaust gas recirculation value, exhaust gas recirculation cooler and diesel particle filter does not fulfil the exemption requirements?*

3. *Is Article 5(1) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information to be interpreted as meaning that an exhaust gas strategy which ensures pollution control devices operate efficiently only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m ('temperature window') and therefore do not generally operate fully functionally during the year in Europe, in particular in Austria, does not fulfil the requirement of Article 5(1) - operation of the vehicle under normal conditions of use - and constitutes a prohibited 'defeat device'?*

B) […] [stay of proceedings] **[Or. 3]**

G R O U N D S

I.) Subject matter of the main proceedings:

By action of 27 December 2017, the applicant sought cancellation (reversal) of the purchase contract of 9 January 2011 between it and the defendant for a VW Caddy Maxi Comfortline 4MOTION 2.0 l TDI, […] in return for a fee for use. The applicant claims that it signed the purchase contract in part in the belief that it was purchasing a new, environmentally-, exhaust gas-, CO_2- and consumer-friendly car with valid type approval, the exhaust gas emissions of which complied with statutory requirements.

It claims that the vehicle manufacturer, Volkswagen AG, applied a new temperature window in the course of a software update, which caused vehicles with updated software to switch off pollution control in outside temperatures of below 15 degrees and above 33 degrees, and at altitudes of 1 000 m above sea level. It states that that temperature window constitutes a **prohibited defeat device**. The applicant claims that no exemption to permitted temperature windows within the meaning of Article 5 of the Regulation exists, in particular as a reduction in pollution control at temperatures of below 15 degrees and above 33 degrees or above 1 000 m above sea level does not directly damage the engine and would therefore not serve to protect the engine.

The defendant contests the claims, including the grounds thereof and their amount and contends that the action should be dismissed and that the applicant should be ordered to pay the costs. The reasons it gives are summarised as follows:

The ‘temperature window’ or ‘ramp out’ is a gradual reduction in the exhaust gas recovery rate depending on the ambient temperature that is applied by all diesel vehicle manufacturers based on the Euro 5 standard. The type approval authority, the Kraftfahrt-Bundesamt (Federal Motor Transport Authority) has been aware of this from the outset and has classed this as a permissible measure within the meaning of Regulation No 715/2007. Furthermore, the Federal Motor Transport Authority had placed particular emphasis during its review of the software update on verification of the durability of the pollution control devices and had established, following detailed review, that the software update had no negative impact whatsoever on the durability of the pollution control devices. **[Or. 4]**

II.) Legal context

The applicant has based its request for reversal of the purchase contract on the fact that it was contrary to accepted principles of morality within the meaning of Paragraph 879(1) of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code). It argues that anyone purchasing a vehicle should be able to expect, in a functioning legal system such as that in the EU, that the vehicle purchased has not been manipulated by the manufacturer. It claims that VW had fitted prohibited defeat devices in approximately 8.5 million vehicles worldwide, thereby deceiving regulatory authorities and consumers for the sole purpose of maximising its profits. The applicant states that this conflicts with the natural sense of justice of

all honest people and should therefore be qualified as being contrary to accepted principles of morality within the meaning of Paragraph 879(1) of the Austrian Civil Code.

Paragraph 879(1) of the Austrian Civil Code states:

A contract which is contrary to a legal prohibition or accepted principles of morality shall be null and void.

The applicant has also based its application on a warranty claim under Paragraph 932(4) of the Austrian Civil Code.

Paragraph 932(1) and (4) of the Austrian Civil Code states:

(1) The purchaser can demand an exchange, a reasonable reduction in the consideration (price reduction) or cancellation of the contract (reversal) on the grounds of lack of improvement (repair or addition of missing parts).

(4) If improvement and exchange are impossible or involve disproportionate expenditure to the seller, the purchaser shall be entitled to a price reduction or, other than in the case of a minor defect, to cancellation of the contract. The same shall apply if the seller refuses to improve or exchange the goods or fails to do so within a reasonable period of time, if such remedies would cause considerable inconvenience to the purchaser or if the purchaser cannot reasonably be expected to accept them for valid reasons for which the seller is to blame. **[Or. 5]**

III.) Necessity of a ruling by the Court of Justice of the European Union

[…] [amplification]

IV. The questions referred:

Legal basis in European Union law

Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (‘Regulation No 715/2007’) states as follows:

Recital 12:

Efforts should be continued to implement stricter emission limits, including reduction of carbon dioxide emissions, and to ensure that those limits relate to the actual performance of vehicles when in use.

Article 3, subparagraph 10:

'defeat device' means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum **[Or. 6]** *or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use*;

Article 5:

(1) The manufacturer shall equip vehicles so that the components likely to affect emissions are designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with this Regulation and its implementing measures.

(2) The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited. The prohibition shall not apply where:

a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle;

b) the device does not function beyond the requirements of engine starting; or

c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.

Article 3(9) of Regulation (EC) No 692/2008 states:

The Type 6 test measuring emissions at low temperatures set out in Annex VIII shall not apply to diesel vehicles.

However, when applying for type-approval, manufacturers shall present to the approval authority with information showing that the NOx aftertreatment device reaches a sufficiently high temperature for efficient operation within 400 seconds after a cold start at -7 °C as described in the Type 6 test.

In addition, the manufacturer shall provide the approval authority with information on the operating strategy of the exhaust gas recirculation system (EGR), including its functioning at low **[Or. 7]** *temperatures.*

This information shall also include a description of any effects on emissions.

The approval authority shall not grant type-approval if the information provided is insufficient to demonstrate that the aftertreatment device actually reaches a sufficiently high temperature for efficient operation within the designated period of time.

At the request of the Commission, the approval authority shall provide information on the performance of NOx aftertreatment devices and EGR system at low temperatures.

Grounds of the questions referred

[…]

This request for a preliminary ruling is necessary inter alia in specific light of the judgments of 17 January 2019 […] of the Landgericht Stuttgart (Regional Court, Stuttgart) and of 31 July 2019 […] of the Landgericht Düsseldorf (Regional Court, Düsseldorf).

The Regional Court, Stuttgart states in paragraphs 1 and 2 of the summary of its judgment:

‘1. The application of a ‘temperature window’ to reduce at low outside temperatures the exhaust gas recovery used in a vehicle to reduce nitrogen oxide emissions (NOx) is a (prohibited) defeat device within the meaning of Article 5(2) and the tenth subparagraph of Article 3 of Regulation No 715/2007. The degree to which exhaust gas recovery is reduced is immaterial, as Article 5(2) does not differentiate the tenth subparagraph of Article 3 of Regulation No 715/2007 by the extent of the change to the pollution control system. **[Or. 8]**

2. Such exhaust gas devices are not permitted as an exemption under Article 5(2)(a) of Regulation No 715/2007 to protect the engine where other state-of-the-art technical solutions are available, regardless of whether they are considerably more expensive.

3. In enacting the information requirement in the ninth subparagraph of Article 3 of the Implementing Regulation (Regulation (EC) No 692/2008), the legislature has also clarified for vehicles that there is no justification for an additional temperature window at low temperatures.

4. Any such defeat device that operates almost continuously (at outside temperatures below 7 degrees Celsius) and is thus contrary to the objectives of Regulation No 715/2007 is unnecessary within the meaning of Article 5(2)(a) of the Regulation.’

The Landesgericht Klagenfurt (Regional Court, Klagenfurt) concurs with that summary. The Regional Court, Klagenfurt takes the view that it follows from the tenth subparagraph of Article 3 of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information that the ‘temperature window’ constitutes a prohibited defeat device within the meaning of that Regulation, in particular as in most countries of the European Union, and in

Austria, Germany and Switzerland in particular, the ambient temperature during the year is generally below 15 degrees Celsius and, due to their geographical location, vehicles frequently travel in areas at an altitude of over 1 000 m, meaning that these conditions correspond to 'normal vehicle operation and use' as set out in the tenth subparagraph of Article 3 of Regulation No 715/2007. The Regional Court, Klagenfurt finds that the exemption allowed under the second sentence of Article 5(2)(a) of Regulation No 715/2007 to protect the engine does not, therefore, provide a legal basis for defeat devices activated during 'normal' use of the vehicle. That court takes the view that this applies in particular to vehicle operation in ambient temperatures of below 15 degrees Celsius. It adds that the ninth subparagraph of Article 3 of the Implementing Regulation (Regulation (EC) No 692/2008 specifies the time within which efficient operation must be guaranteed following a cold start. According to that provision, **[Or. 9]** the NOx aftertreatment device must reach a sufficiently high temperature for efficient operation within 4 seconds after a cold start at -7 °C. In that context, the approval authority should not grant type-approval if the information provided is insufficient to demonstrate that that requirement is fulfilled. The Regional Court, Klagenfurt holds that it follows from that information requirement that the legislature has clarified that there is no justification for a further temperature window in addition to that exemption. According to the Regional Court, Klagenfurt, the 'temperature window', which guarantees efficient operation of pollution control devices only between 15 and 33 degrees Celsius and only below an altitude of 1 000 m, meaning that they do not generally operate fully functionally during the year in Europe under normal conditions of use, in particular in Austria, does not fulfil the requirement of Article 5(1) of Regulation No 715/2007 and is a prohibited defeat device.

[…]

Klagenfurt, 19 February 2020

[…] [remarks]